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SUPREME COURT OF THE UNITED STATES

74-1512

No. _____

JOSEPH RAYMOND VITTITOW - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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SUPREME COURT OF THE UNITED STATES

No. ———

JOSEPH RAYMOND VITTITOW - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - *Respondent*

PETITION FOR A WRIT OF CERTIORAI TO THE COURT OF APPEALS OF KENTUCKY

The Petitioner, Joseph Raymond Vittitow, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky affirming the conviction of the Petitioner in the Warren Circuit Court at Bowling Green, Kentucky.

OPINIONS BELOW

The Trial Court rendered no written opinion in this case. The opinion of the Court of Appeals of Kentucky was a memorandum opinion, not to be cited as authority, which will not be reported. It is printed in the Appendix to this petition at page 1a. The mandate of the Court of Appeals of Kentucky denying the Petitioner's motions for rehearing appear in the Appendix at pages 9a-11a.

JURISDICTION

The Judgment of the Court of Appeals of Kentucky was entered on October 25, 1974. A timely petition for rehearing and supplemental petition for rehearing (due to change of counsel) were denied on February 21, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1275 (3).

QUESTIONS PRESENTED

I. **Whether the Petitioner was denied his fourteenth amendment right of due process of law because he was convicted of a crime in the absence of evidence proving one of the essential elements of the offense?**

II. **Whether the Petitioner was denied his fourteenth amendment right of due process of law where the trial Judge allowed admitted into evidence the fruits of a warrantless search of Petitioner's automobile?**

III. **Whether the Petitioner was denied his fourteenth amendment right of due process of law where the trial Judge allowed admitted into evidence exhibits and testimony regarding photographs which were not shown to defense counsel until the midst of the trial?**

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of cit-

izens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner, Joseph Raymond Vittitow, was indicted for storehouse breaking and grand larceny relating to a break-in of a drugstore in the small Warren County community of Smiths Grove in the early morning hours of August 22, 1973.

Separately indicted on the same charges arising out of the same incident were one Eugene Byrns and one James Stillwell. Byrns pled guilty, but Stillwell was still at large on the date of Vittitow's trial. Vittitow was tried alone. Co-defendant Byrns didn't testify at the trial and no eyewitnesses identified Vittitow as a participant in the break-in. The case for the prosecution was solely circumstantial.

The drugstore was owned and operated by a Mr. Bevarly who lives four and a half blocks from his store (Transcript of Evidence, hereinafter T.E., p. 75). Around 1:30 on the morning of August 22, 1973 Beverly was signalled by an alarm system in his store (T.E. 77). While his wife called the sheriff, he ran to the store, gun in hand. Arriving at the rear of the store, he saw three silhouettes of men as they came up on the roof from a small hole (T.E. 155) which had been torn in it (T. E. 83). He alerted them of his presence, and two men jumped off the roof on the side of the

building away from Bevarly, leaving a distinct boot print in the ground (T.E. 82-84). The third man, Byrns, jumped off the roof close to Bevarly, and so Bevarly, with his shotgun, captured him and held him until the authorities arrived (T.E. 82-83, 85-86, 88). Meanwhile, a neighbor responding to a call from Bevarly's wife, drove up in front of the store. As his car's lights shone on the store's window, he saw three, unidentifiable men inside the store, scurrying toward the rear where the small hole in the roof was later found (T.E. 128-130).

When the sheriff's officers and the Smiths Grove Chief of Police arrived, an inspection of the premises disclosed that a sizeable quantity of wrist watches and drugs had been assembled under the roof hole apparently in preparation for asportation (T.E. 167). Also discovered and carefully preserved, was a distinct boot print in the dirt, probably made by one of the burglars when jumping off the roof (T.E. 160, 98). A photograph was made of this boot print and introduced at trial (T.E. 64-65).

When the authorities arrived at the scene they searched the captured Byrns. Found on him were several watches and drugs which came from the drugstore (T.E. 100-165-6). Later, clothing worn by Byrns was placed under laboratory analysis, and particles of ceiling tile and wood fibers found on him matched the tile and fibers around the hole in the store roof (T.E. 71-75).

Within a short time after the authorities arrived at the store, Chief of Police Denham was sent in his

car to survey the community in search of the suspects remaining at large. After scouting several blocks with his search light, Denham noticed a car turning toward him off of another street. The car, coming from a direction away from the drugstore (T.E. 150), turned onto the street on which Denham was traveling, turned off its lights, pulled to the side of the street and parked. The only occupant, Vittitow, got out and walked toward a nearby house (T.E. 140-1). Chief Denham drove up to the parked car and called out to him. Subsequently, Vittitow walked over to Denham's car and in response to questioning, explained that he was hunting water for his car which he believed to be hot. Seeing no steam from Vittitow's car and suspecting the stranger's story (Vittitow was from Louisville), Denham directed him to get in the police car. Vittitow did as directed without any resistance, and was taken to the drugstore (T.E. 13-15).

At the store, Deputy Woods from Bowling Green came up and asked Vittitow to raise his right foot up, whereupon once he did, Major Woods placed him under arrest for storehouse breaking (T.E. 15, Testimony of Chief Denham). Major Woods, on the other hand, recalled that Vittitow was not placed under arrest for about twenty minutes after Denham brought him to the drugstore (T.E. 114). Within minutes (T.E. 117) of the "official arrest" Vittitow was placed in a police vehicle and taken to the county jail in Bowling Green. Just before or just after he was put in the police car, Major Woods sent Chief Denham back to the parked car of Vittitow's to search it (T.E. 116-8). Prior to

that a search of his person had been effected, and nothing was found on him (T.E. 119 and 73-4).

However, in Vittitow's car Denham found two billfolds; one containing papers identifying Byrns and the other, Stillwell (T.E. 118, 163-5). (No connection of Stillwell with the burglary was ever shown).

Approximately six weeks prior to trial, Vittitow filed motions for discovery. (Court Transcript 7-8), requesting, inter alia, inspection of all exhibits which the Commonwealth intended to use at trial, and under the principle of *Brady* v. *Maryland*, 373 U. S. 83 (1963), all exhibits which the Commonwealth might have but did not intend to use at trial. The Commonwealth responded (Ct. Trans. 12) agreeing to inspection of appellant's counsel of its exhibits and stating, "Any photographs, exhibits, maps or diagrams in the possession of the Commonwealth will be used in the trial and entered into evidence." Appellant's counsel made an inspection of exhibits several days prior to trial pursuant to the circuit court's order directing production (Ct. Trans. 13; T.E. 122-3).

At trial, the Commonwealth introduced, over objections, a key purportedly taken from Byrns which fit the ignition of Vittitow's car. This key had not been shown to appellant's counsel until the morning of the second day of trial, about one hour before its introduction as evidence (T.E. 122-4).

At trial, the Commonwealth's introduced, over objections, a key purportedly taken from Byrns which fit the ignition of Vittitow's car. This key had not been shown to appellant's counsel until the morning

of the second day of trial, about one hour before its introduction as evidence (T.E. 122-4).

At trial, the Commonwealth's scientific expert and head of the mobile crime lab, Al Burnett, testified that he photographed the boot print found at the scene, and the photos were introduced into evidence (Commonwealth's exhibits 5 & 6, T.E. 64-5). The photographed boot print *did not match* the boots of Vittitow (Defendant's exhibit 1, T.E. 73, 187-8).

However, when faced with this difference between the photographed print and the boots of this appellant, Major Woods asserted there had been other boot prints at the scene, but the photographs of them did not come out clear enough (T.E. 160-1, 186-9). These unclear photos, or their existence, were never revealed to appellant's counsel until the trial testimony just cited; and they were not introduced into evidence or produced for inspection by counsel.

Prior to trial, appellant moved to suppress the two billfolds seized in the search of his car. A hearing was begun just before the trial and continued, during recesses, while the trial progressed. The motion was overruled (T.E. 1-37; 104-127).

The appellant renewed his suppression motion and moved for a judgment of acquittal, at the conclusion of the Commonwealth's case, because the evidence was insufficient to sustain a conviction. The motions were overruled (T.E. 204-7, 210), and the case was submitted to the jury, whereupon Vittitow was acquitted by the jury of the charge of storehouse breaking *but* convicted of grand larceny (Ct. Trans. 21; T.E. 236).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Presents a Substantial Constitutional Question of Whether the Conviction of a Criminal Defendant in the Absence of Evidence Proving One of the Essential Elements of a Crime is a Violation of Due Process of Law, the Resolution of Which is in Conflict Among the Various Federal and State Jurisdictions.

The jury in the trial below determined there was insufficient evidence to convict Raymond Vittitow of storehouse breaking, and acquitted him on that charge. But, the jury convicted him of grand larceny on the basis of proof by association of both Vittitow and Byrns with the automobile Vittitow was driving, contrary to KRS 433.220.[1]

There was no proof, whatever, of appellant Vittitow's association with the burglarized drugstore. Indeed, the evidence at trial effectively disproved any connection between Vittitow and the store:

(1) Three men were seen inside the store as the burglary was discovered (T.E. 129).

(2) Three men came up to the roof of the building to jump off (T.E. 82-3).

(3) The three men obviously descended into the store and came up to the roof through a torn two-foot square hole (T.E. 155).

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[1]KRS 433.220 Grand Larceny—Taking of vehicle without consent of owner. Any person guilty of larceny of money or other property of the value of one hundred dollars ($100) or more shall be confined in the penitentiary for not less than one (1) nor more than five (5) years. Any person who unlawfully takes, drives or operates a vehicle without the knowledge and consent of the owner shall be subject to the same punishment. (1194, 2739g-58: amend. Acts 1962, ch. 245 § 1)

(4) The one man captured at the scene, Byrns, was covered with wood fibers and ceiling tile from the hole in the roof of the store (T.E. 68-73).

(5) No trace of fibers, tile, or any element from the store building was found on Vittitow, his clothes, or the car he was driving (T.E. 73-4; 175).

(6) The captured Byrns had his pockets and clothing filled with watches and drugs from the store (T.E. 100-1).

(7) Neither Vittitow nor the car he drove possessed any loot from the burglary (T.E. 120-1, 175).

(8) A boot print was made by a burglar jumping off the roof (T.E. 64-6; 98).

(9) Vittitow, who weighs 200 or more pounds and who was wearing boots did not make the boot prints (T.E. 192, 187, 73, 188).

(10) The two burglars who jumped off the roof and escaped ran away on foot (T.E. 84). The Smiths Grove Chief of Police, who has lived in that small community all his life (T.E. 124), learned when he arrived at the scene that the escaping burglars had been heard running toward the Oakland Road (T.E. 131). But, when it was pointed out to him that the Oakland Road was in the opposite direction from when Vittitow was driving when discovered, Chief Denton allowed that he was confused about the location of the roads around Smiths Grove, and the burglars had been heard running toward the Rocky Hill Road (T.E. 144-5), the opposite direction from where the car was.

(11) In any instance, Vittitow was arrested approximately one-half mile from the drugstore, coming

from a direction away from the store (T.E. 150). He was not puffing or perspiring as if he had been running on that August night (T.E. 142-3).

The Commonwealth *did* prove that a break-in occurred at the Smiths Grove Drugstore in the dark of August 22, 1973; and three men were involved, one of whom was Byrns.

Allowing the Commonwealth the benefit of some reasonable inferences, appellant Vittitow was shown to have been in Smiths Grove not long after the commission of the crime, driving an auto with out of county license plate, in which a wallet of Byrns was found (that is, assuming, arguendo, that the evidence complained of above was properly admitted. And it should be remembered that no evidence connected the auto to the crime in any way).

In the case of *Hodges* v. *Commonwealth,* Ky., 473 S. W. 2d 811, 814 (1971), Hodges was tried and convicted of breaking and entering a storehouse because he was caught hiding under a log on a January day in a nearby woods with the man who had been seen running from the victimized building. When Hodges and his companion were found behind the log they ran from the lawmen. When Hodges appealed, the Court reviewed a number of its decisions relating to circumstantial cases and sufficiency of evidence and concluded:

> ". . . It is obvious that strong suspicion of Hodges involvement in the crime arises from the circumstances shown. Suspicion alone is not enough. (Citations omitted) Hodges had no duty to explain why he was where the officers found him.

> There is nothing in the competent evidence which indicates that Hodges was at the crime scene, nor is there anything other than his being found with Moore five hours after the latter's flight from the store, tending to prove his complicity in the crime. These circumstances, suspicious though they are, do not point so unerringly to Hodges involvement as to warrant submission of the case to the jury."

Although Alonzo Hodges had been found guilty because (1) he associated with a criminal, (2) his association with that criminal was in a suspicious location at a suspicious time, and (3) he tried to run away when found together with the criminal. Yet, that was *not enough.*

Vittitow was found guilty of grand larceny because (1) the jury could readily infer that he had associated with Byrns (the wallet in his car), (2) his location not long after the crime was suspicious, and (3) just as Hodges had run, Vittitow denied knowing Byrns (T.E. 99). Thus, in this case, that was *not enough.*

In *Guthrie* v. *Commonwealth,* Ky., 508 S. W. 2d 40 (1974), the Court of Appeals held that suspicion of commission of felony is insufficient to authorize arrest. The Court went on to explain,

> "In *Johnson* v. *Commonwealth,* Ky., 443 S. W. 2d 20 (1969), we inadvertently indicated at page 22, that a police officer is authorized to arrest '* * * on suspicion of the commission of a felony * * *'. Suspicion alone is insufficient."

And the Court went on to cite KRS 431.005, the statute authority.

In *Shanks* v. *Commonwealth,* Ky., 504 S. W. 2d 709 (1974), the appellant argued that the warrantless search was not incident to a valid arrest, therefore the search was impermissible. And, until the police officers entered the motel room, their testimony disclosed that they had observed nothing which justified Shanks' arrest. "Since it (the arrest) was without warrant, it could be valid only if for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty." There having been no probable cause for arresting Shanks revealed by the adduced testimony, the items seized should not have been admitted into evidence. So the Court stated that the search and seizure could not be validated under any of the carefully drawn exceptions to the constitutional requirement of a warrant. The Court reversed the judgment.

In *Ralya* v. *Commonwealth of Kentucky,* Ky., 495 S. W. 2d 506 (1973), the Court of Appeals held that the rule on the sufficiency of circumstantial evidence to establish the corpus delicti is that it must be more consistent with guilt than with innocence; that in evidentiary matters the law looks for reasonable probabilities, and even in a criminal case a jury may properly believe that which the evidence fairly indicates to have been reasonably probable. The Court went on to say that though possession alone will justify conviction of theft (if the theft is proved), it will not suffice to prove a breaking and entering. (In that case

the defendant was convicted for breaking and entering and stealing a license plate.) The Court went on to affirm the lower court except as to the conviction for breaking and entering, for which they reversed, and stated that if the evidence be the same, the defendant shall be entitled to a directed verdict of acquittal.

In *United States* v. *Velasquez*, 396 F. 2d 1009, 1010 n.1 (5th Circuit, 1974) that Court stated that "In circumstantial evidence cases the test to be applied on motion for judgment of acquittal and on review of the denial of such motion is not simply whether in the opinion of the trial judge or of the appellate court the evidence fails to exclude every reasonable hypothesis, but that of guilt, but rather whether the jury might reasonably so conclude. *Vick* v. *United States*, 5 Cir. 1954, 216 F. 2d 228, at 232." The Court noted in *Velasquez* that the appellants began correctly by recognizing the general rule that the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government to support it.

Finally, on this point, probably the best case to parallel the case at bars is that of *United States* v. *Horton*, 488 F. 2d 374 (1973), in that the Court considered whether there was sufficient evidence in the record to sustain in the conviction of the co-defendant Jordan. The Court said that in circumstantial evidence cases, the trier of fact must "reasonably find that the evidence excludes every reasonable hypothesis, except that of guilt." Further, the Court stated that in measuring the sufficiency of evidence against this standard,

"we must affirm any conclusion that could be reached by reasonable minds". The record in that case demonstrated Jordan's proximity to the illegal substance and the person who had control over it, but the Court held it insufficient to sustain his conviction. They said: "Jordan denied knowledge of the existence of the heroin or of any transactions involving drugs. As previously stated, the attache case containing the heroin belonged to Horton *although it was found in Jordan's automobile* (emphasis ours). Furthermore, the evidence does not establish any type of 'working relationship' between the parties regarding the heroin but merely an association . . . we reverse and remand with instructions to enter a judgment of acquittal with *respect to defendant Jordan.*"

All of the evidence introduced by the Commonwealth did not add up to enough to produce more than a strong suspicion. That, as this Court has said so many times, is not enough; and the trial court should have sustained appellant's motion for a judgment for acquittal (T.E. 204-207, 210).

And that, as appellant has shown, was more than the Commonwealth was entitled to introduce. Without the billfolds, the fruit of the illegal search of the auto, and without the key found on Byrns, produced from hiding midway through the trial, the Commonwealth could not even charge guilt by association.

The verdict of the jury, acquitting appellant of storehouse breaking *but convicting him of grand larceny,* is especially confusing. It is apparent, that the jury concluded that Vittitow did not enter the drug-

store. But he was in Smiths Grove that night. The jury, it appears, determined that such unexplained association was too sinister to allow the appellant to go free. But, if the jury determined that the appellant was not at the store, as they did to render such a verdict, then the appellant should be freed. All evidence of the Commonwealth pointed to three participants in the burglary—no more. All three were inside the store. All three ran up to the roof and jumped off, and ran in different directions from where Vittitow was found. There is no foundation in evidence or reasonable inferences from the evidence to cogently support a "fourth man" theory, which the jury must have created. Therefore, the verdict is neither based upon nor sustained by sufficient, competent evidence, and it should be overturned.

II. The Admission Into Evidence of Fruits of the Warrantless Search of Appellant's Automobile Presents a Substantial Constitutional Question Concerning a Criminal Defendant's Fourteenth Amendment Due Process Right to a Fair Trial.

At the request or direction of the Police Chief, Vittitow left his car parked on the side of a street and rode several blocks (about a half-mile: T.E. 150-1) in a police vehicle to the drugstore. About twenty minutes after the Chief brought Vittitow to the scene of the crime, he was "officially arrested" (T.E. 114) and the Chief was sent back to the parked car to search it (T.E. 118).

The Chief asserted that after he got in the car, he found the billfolds of Byrns and Stillwell lying on the floorboard partially exposed and partially under the passenger seat. (This attorney has never known an item seized from under a car seat to be other than "partially exposed" to the view of the searching officer.) After finding the billfolds, the Chief returned to his police car and drove back to the drugstore, and delivered his find to Major Woods (T.E. 134-135).

One could argue that Major Woods effected the arrest of Vittitow in front of the drugstore twenty minutes after Vittitow's arrival. Or an argument could be sustained that the appellant was arrested by Chief Denham twenty minutes earlier, right after he accosted the stranger looking for water for his car. But these arguments would not be significant:

> "It may have been 10 minutes, as contended by the Commonwealth, before the search was made at the garage, or it may have been 10 hours. In this case the element of time is immaterial." *Commonwealth* v. *Lewis,* 309 Ky. 276, 217 S. W. 2d 625, 626 (1949).
>
> "The search was conducted without a warrant, without Senibaldi's (the appellant) consent, and outside his presence. *Thus it was an illegal search."* *Senibaldi* v. *Commonwealth,* Ky., 338 S. W. 2d 915, 919 (1960).
>
> "Evidence obtained by a search made after an arrest, but not made in the immediate presence of the arrested person or incident to the arrest is inadmissible . . . The search was made sometime after the arrest and after both appellant and the truck

had been brought to Morehead. It was not made incident to the arrest nor in appellant's immediate presence. It was prejudicial error to admit the evidence obtained as a result of the search." *Flannery* v. *Commonwealth,* Ky., 324 S. W. 2d 128, 129 (1959).

"We have several times held such evidence inadmissible where it was not made incident to an arrest or in the accused's immediate presence." *Tabor* v. *Commonwealth,* Ky., 380 S. W. 2d 245, 246 (1964).

The Court of Appeals of Kentucky has repeatedly held the principle in *Preston* v. *United States,* 376 U. S. 364, 11 L. Ed. 2d 777 (1964), before and since it was enunciated.

The Commonwealth, in the case at bar, sought support for this warrantless search on some basis other than as incidental to the arrest. But there is no support in law for that occasion:

"Warrantless searches are per se unreasonable under the Fourth Amendment to the Constitution of the United States 'subject only to a few specifically established and well-delineated exceptions which are jealously and carefully drawn.' Coolidge v. New Hampshire, 403 U. S. 443 . . . Our inquiry in this case is whether the warrantless search can be justified under one of these 'established and well delineated' exceptions."

"The Collidge case reaffirms the basic holding in Carroll v. United States, 267 U. S. 132 . . . that was approved in Chambers v. Maroney, 399 U. S. 42 . . . The Carroll decision was that contraband

> goods concealed and illegally transported in an automobile may be searched for without a warrant provided that 'the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported.'" *Ison* v. *Commonwealth*, Ky., 471 S. W. 2d 712, 713-714, (1971).

The Commonwealth in the case at bar cannot support an assertion of reasonable cause to believe that contraband was being illegally transported, for the loot of the burglary was left in the drugstore by the discovered burglars when all three jumped off the roof and ran. Byrns, the captured one, had only a few stolen items in his pockets, and the tools involved were left on the roof (T.E. 64-5). Nothing was left to the burglars to transport in a car.

Security of the car cannot be cogently claimed a basis for Denham's (the Police Chief) return and search. He left the car unattended for at least twenty minutes while the officers at the crime scene decided whether they should "officially arrest" Vittitow. In addition, as soon as Denham found the billfolds in the car, he left it again, without any provision or concern for its security.

The record shows that "Vittitow's car" was in fact registered to another man, and not his own car (T.E. 170). Appellant's standing to challenge the search of this car may be contested. Yet there should be no question of his standing in the instant case, for in light of *Joseph* v. *Commonwealth*, Ky., 324 S. W. 2d 126

(1959), the Court held that the defendant who fled from a borrowed car had standing to challenge the subsequent warrantless search and reversed the conviction because the search was unreasonable.

In *Roaden* v. *Kentucky*, 93 S. Ct. 2796 (1973), the Court said: ". . . Where there are exigent circumstances in which police action literally must be "now or never" to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation" and "The Fourth Amendment proscription against 'unreasonable . . . seizures,' applicable to the States through the Fourteenth Amendment, must not be read in a vacuum. A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material. Cf. Coolidge v. New Hampshire, 403 U. S. 443, 471-472 . . . The question to be resolved is whether the seizure of the film without a warrant was unreasonable under Fourth Amendment standards and, if so, whether the film was therefore inadmissible at the trial. The seizure of instruments of a crime, such as a pistol or a knife, or 'contraband or stolen goods or objects dangerous in themselves' . . ."

Petitioner reiterates that there were no fruits of a crime in the car, for the "fruits" were on the captured Byrns or in and on the drugstore. Nothing was left for transportation in a car.

One last argument on this point involves the ready availability of judicial officers for application for a search warrant in this instance. The city judge of Smiths Grove lives only a few blocks from the scene

of the crime (T.E. 125-6). And a magistrate of Warren County lives about a mile outside the community. The chief of police would have had no difficulty locating either (T.E. 126).

Johnson v. *United States*, 333 U. S. 10 at 13-14, 92 L. Ed. 436 at 440 (1948), Justice Jackson for the majority, noted:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers."

III. The Admission Into Evidence of Exhibits and Testimony Regarding Photographs Which Were Not Shown to Appellant's Counsel Until the Midst of the Trial Presents a Substantial Constitutional Question Concerning a Criminal Defendant's Fourteenth Amendment Due Process Right to a Fair Trial.

The Commonwealth's case was based solely on circumstantial evidence. A circumstantial case is built and sustained through accumulation of circumstances. Defense against such a case consists primarily of a re-

sponse to each circumstance so as to disprove the association of one to another and, at least, weaken the cumulative effect of the sum of the circumstantial evidence. Pursuant to the Circuit Court's order (Ct. Trans. 13), entered in response to appellant's motion for discovery (Ct. Trans. 7-8) and the Commonwealth's reply (Ct. Trans. 12), counsel for appellant met with the sheriff's deputy in charge of the case and inspected all exhibits and real evidence shown to him (T.E. 122-123).

The second day of the trial, as court was about to convene, Defense counsel for the first time was shown a key. This key was introduced in evidence about an hour later and identified as having been found in the search of the person of co-defendant Byrns. That key, according to the deputy, fit the ignition to the car Vittitow was driving (T.E. 122-4, 166). Appellant had no opportunity to examine or test the key, to consider it, or prepare any response to its introduction more than midway through the trial. Appellant objected and moved to exclude the key from evidence (T.E. 124).

James v. *Commonwealth,* Ky., 482 S. W. 2d 92, 94 (1972), held that a cat and mouse game whereby the Commonwealth is permitted to withhold important information requested by the accused cannot be countenanced. And this is the case at bar.

In reply to discovery motions of the appellant pursuant to RCr 7.24 and *Brady* v. *Maryland,* 373 U. S. 83 (1963), the Commonwealth Attorney stated: "Any photographs, exhibits, maps, or diagrams in the pos-

session of the Commonwealth will be used in the trial and entered into evidence" (Ct. Trans. 12) The Commonwealth agreed to inspection by appellant of all such evidence and asserted that it had none it was hiding (Id.).

Photographs of boot prints and the boots worn by Vittitow at the time of his arrest were introduced by the Commonwealth into evidence. The boot prints in the photos were clearly and distinctly not those of Vittitow (T.E. 64-6; 73; 187).

Throughout the trial, until appellant pointed out the clear distinction between the prints and boots, the Comonwealth took great pains to show that the prints found on the ground appeared at the location of the burglar's jump, that the prints had been carefully preserved, and the photos were taken of the spot "where the subject was supposed to have jumped off the store roof (T.E. 65-6; 97-8; 110-4). But, Major Woods, last witness for the Commonwealth, and the one who produced the key from Byrns, added a new element to the boot print circumstance. When asked if the photographic exhibits represented the way the prints looked at the crime scene, he stated: "Not all of them. They didn't turn out. We was unable to get them" (T.E. 161).

These unclear photos were never shown to appellant or the jury. He was never advised of the existence of other prints or photos or photographic attempts. He was advised by the photographer, Al Burnett, a well-qualified man with twenty-one years experience in scientific law enforcement investigation

(T.E. 67) that the photos he produced were those of the ones he saw (T.E. 64-6). *And the prints did not match the boots.* (Emphasis ours.) Thus, Vittitow's comparison of the soles of his boots with the photos proved that he was not the one who made the impression in the ground where the burglars escaped.

The deputy sheriff's vague qualification of the testimony of all preceding witnesses through references to photos of "other boot prints that didn't turn out" did effectively weaken the disproof of Vittitow's part in making the prints. And appellant had no opportunity to know of or examine these unclear photos.

While the deputy sheriff did not categorically assert that the unclear boot prints matched Vittitow's boots, Vittitow had established that those shown did not, and the belated references to "similarity" circumvented the evidence and deprived the appellant of a crucial part of his defense. The game played by the Commonwealth was manifestly unfair to the appellant, and the Court should notice this substantial error upon a critical issue at trial. RCr 9.26.

CONCLUSION

The conviction of Raymond Vittitow of grand larceny was based solely on evidence of his "presence" in the community where the burglary occurred and strictly on unspecified association with Byrns, the captured suspect on the night of the crime. While there may be inferred that circumstances surrounding his arrest were unusual, there was no evidence, circum-

stantial or real, of any specific or general action by him to warrant the charge of the commission of the act of *grand larceny.*

The circumstantial case of the Commonwealth of Kentucky in the trial below was made out to convince the jury that Mr. Vittitow was one of three men who burglarized a drug store. The jury was not convinced as they brought back an acquittal on that count. But the jury had to create a "theory of the case", one of guilt by "being in the wrong place at the wrong time". Such theory is without support and it should not stand, but the judgment should be reversed.

We respectfuly submit that the Court should grant the Petition because the three issues stated herein present substantial Constitutional questions concerning a criminal defendant's Fourteenth Amendment due process right to a fair trial.

Respectfully submitted,

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Attorney for Petitioner

COURT OF APPEALS OF KENTUCKY

RENDERED: OCTOBER 25, 1974

No. 74-312

JOSEPH RAYMOND VITTITOW - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Warren Circuit Court
Honorable Thomas W. Hines, Judge
No. 14,934

MEMORANDUM OPINION OF THE COURT BY COMMISSIONER CULLEN— AFFIRMING

(Not to be cited as authority)

It is the opinion of this court that the evidence was sufficient to sustain the conviction, the search was valid, and there was no prejudicial error in regard to the admission of evidence.

The judgment is affirmed.

All concur.

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MANDATE

THE COMMONWEALTH OF KENTUCKY
The Court of Appeals
74 Term—October 25, 1974

Joseph Raymond Vittitow
v.
Commonwealth of Kentucky

Appeal from a judgment of the Warren Circuit Court #14,934; File # 74-312

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

A copy—Attest:

Frances Jones Mills, C.C.A.

By _____, *D.C.*

Issued February 21, 1975
Appellant's Petition for Rehearing Denied—2/21/75

TRANSCRIPT OF EVIDENCE

Bowling Green, Kentucky
December 12 & 13, 1973

Appearances

For Commonwealth:

Hon. Morris Lowe, Commonwealth Attorney, Bowling Green, Kentucky

For Defendant:

Hon. Phillip Huddleston, Huddleston Brothers, 1032 College, Bowling Green, Kentucky

VOLUME I
December 12 & 13, 1973

PORTIONS OF TESTIMONY OF OFFICER A. E. BURNETT

By Mr. Huddleston:

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Q. 74. Okay. And on the exhibits that came from the clothing of Joseph Vittitow, nothing?

A. One, two and three, nothing of any value.

Q. 75. Nothing. Mr. Burnett, you also saw, examined and took a photograph of a boot print, is that correct, sir?

A. Yes, sir.

Q. 76. I believe you also had available or one of your assistants had available a boot taken from Joseph Vittitow, is that right?

A. True.

Q. 77. Can you match that boot to the print?

A. It doesn't match, no, sir.

Q. 78. It doesn't match?

A. No, sir.

Q. 79. Mr. Burnett, would it be fair to say, based upon your examination of this scene and the evidence that you gathered and that was given

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to you from this scene combined with the abilities of the Kentucky State Laboratory and your effective mobile lab and your twenty-one years of experience, that there's not a thing that you can connect Joseph Vittitow with in this crime?

A. Relative to scientific crime detection, I can't. I don't know what the other officers have.

Q. 80. Okay. You can't?

A. No, sir.

Mr. Huddleston: Thank you, sir. That's all I have.

* * * * * * *

CARROLL BEVARLY, having been duly sworn and testifying on behalf of the Commonwealth, testified as follows:

Direct Examination by Hon. Morris Lowe:
(portions of testimony)

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Q. 35. All right, sir. Now, you approached the drugstore from the back?

A. No, I approached it originally from the front; and when I couldn't—didn't notice any activity, then I made my way to the back of the store, yes, sir.

Q. 36. All right, sir. Did you see any strange automobiles in the vicinity at that time?

A. No, sir, there weren't any there.

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Q. 79. Now, were you out in front of the building when (they) saw this car coming down the road?

A. Well, I didn't see the car coming down, but I talked to Mr. Denham about it and told them—told him—in fact, I told the other sheriff's deputies, but I couldn't get them to go and look—going out and looking for a strange car that time of the night, now, is just a little bit tricky. And I couldn't convince the other two deputies that there would be anybody else around that time of the night; but having had some previous experience with this type of—

Mr. Huddleston: Objection, Your Honor. This is hearsay and not admissible and irrelevant.

Mr. Lowe: Well, let me ask him. Let me ask him some questions.

(Objection was not ruled on.)

* * * * * * *

VOLUME II
December 13, 1973

(December 13, 1974: Warren Circuit Court Courtroom. At this time the hearing on a Motion to Suppress continues in the Warren Circuit Courtroom outside the hearing of the Jury):

GLEN WOOD, having been duly sworn, testified as follows: (portions of testimony)

Direct Examination by Hon. Phillip Huddleston:

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A. Right, sir.

Q. 101. Now, how many wallets were there,—

A. (Interrupting) Two.

Q. 102. (Continuing)—two or three?

A. Two.

Q. 103. So, if he says three, he's mistaken?

A. Well, two's all I have, sir.

Q. 104. So, if he got three out of the car, he's holding one back?

A. Like I say, two's all I got.

Q. 105. All right. Now, he brought back nothing else besides these things?

A. This was all I was given, sir.

Q. 106. Okay. When you searched Vittitow, did you find any of the loot from the break in on him?

A. No, sir. Not that I could swear was from the break in.

Q. 107. All right. Now, the car—do you have any evidence that indicated to you it was from the break in?

A. The car itself?

Q. 108. No, from the search of Vittitow himself?

A. Well, yes, sir. It all fits in together because of this: the key—

Q. 109. (Interrupting) No, the search of Vittitow. In the search of Vittitow's person, did you find any loot or anything that indicated

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it was taken from the break in?

A. As I stated, sir, none that I could swear that was.

* * * * * * *

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Q. 128. Now, is it not correct also that this morning about a half an hour to an hour ago, you showed me an envelope that you had forgotten to show me?

A. Yes, sir.

Q. 129. All right. And in that envelope that you had forgotten to show me that you showed me this morning, you said there was a—you showed me a key and said that that was a key that was taken off of

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Eugene Byrns when he was searched and that that key fit the car that Vittitow was driving. Is that correct?

A. Yes, sir.

Mr. Huddleston: All right. Your Honor, that's all I have of Major Wood at this time. I would—while I'm thinking of it, I would like to interpose at this time an objection to any attempt to introduce this key I have just described that was taken off of Eugene Byrns for the reason of failure to comply with the Order of this Court and failure to comply with the Rules of Discovery by the Commonwealth.

The Court: Mr. Lowe.

Mr. Lowe: Judge, he's been showed the key now.

Mr. Huddleston: An hour ago right in the middle of the trial.

* * * * * * *

The Court: Motion overruled. Anything else?

* * * * * * *

(Portions of testimony of WILLIAM DENHAM, Chief of Police, Smiths Grove, having been duly sworn and testifying on behalf of the Commonwealth.)

Direct Examination by Hon. Morris Lowe:

* * * * * * *

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... And I said, "Well, get in just a minute". And without any resistance he walked around in front of the car and got in beside me, and we drove down to the drugstore. And Major Woods questioned him a few times. I don't exactly know what he did say to him other than he told him to raise his foot. He raised his foot, and Major Woods placed him under arrest for Storehouse breaking.

Q. 10. Then what happened?

A. He was later brung to the Warren County Jail. I went back—Major Woods got a key when he searched him (Vittitow)—got a key, and asked me to go back to the car and see if the car had any—was locked or see if that key would fit the ignition. And I went over there, and the key did fit the ignition.

* * * * * * *

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A. I went back to the car. The car wasn't locked. I reached over—I undone the door like that and reached in there to put the key in the car. There was some billfolds and a pair of flip-flop shoes. The billfolds was laying, well, on the passenger side just about half way under the seat.

* * * * * * *

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Cross-examination continues by Hon. Phillip Huddleston of witness GLEN WOOD: (Portions of testimony)

Q. 147. Major Woods, thinking of your testimony over lunch, I recall you said that you had searched Mr. Vittitow at the time you arrested him. You searched his person and all the clothing he had on, is that right?

A. Yes, sir.

Q. 148. Okay. And everything that you found on him, you took off of him?

A. Yes, sir.

Q. 149. You said you did not find any drugs on Mr. Vittitow, is that right?

A. That's correct.

Q. 150. You didn't find any watches on Mr. Vittitow, is that right?

A. Right.

Q. 151. And you didn't find any of the loot, any loot from the robbery on Mr. Vittitow, is that right?

A. Not that I could swear was, sir.

* * * * * * *

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Q. 191. I don't recall, Major Wood, whether you were present when Mr. Bevarly testified or not, but are you aware that he testified that there was a boot print or prints of a boot, and he was present when he heard the burglars jump off the back of the roof?

A. Right, sir.

Q. 102. And he went around, and he saw shortly after that the boot print?

A. We, I mean, I didnt hear him testify; but, I mean—in other words, he was there.

Q. 193. He told essentially that same thing?

A. Not of the print. He talked about of the area of hearing someone come off of the roof, yes.

Q. 194. You are not aware that he testified yesterday that this photograph is of the boot print that he found?

A. No, sir.

Q. 195. Mr. Wood, this photograph, the print shown in this, and these boots are not the same, are they?

A. That's correct, sir.

Q. 196. They are not the same, are they?

A. That's correct.

Q. 197. Somebody else made these boot prints, didn't they?

A. That's correct.

* * * * * * *

DEFENSE COUNSEL'S MOTION FOR JUDGMENT OF ACQUITTAL

Volume II

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The Court: (Interrupting) Now, we've gone through that, and the Court has moved that the evidence will not be suppressed, and that it is admissible into the Court, in the trial of this case. All right. What's your other point?

Mr. Huddleston: Next, Your Honor, our motion that we would like to be heard on is a motion for a judgment of acquittal on the basis of insufficient evidence, and we'd like to cite to the Court a few cases and instances where the Court of Appeals has held things similar to this to be insufficient to go to the jury. Number one, I'd like to cite the case of Hodges against the Commonwealth. In that case, the Court of Appeals reversed the Barren Circuit Court. In that instance, the proof was that a man named Moore was seen by the City Chief of Police of Cave City leaving or running out of the scene of a burglary, out of a hole that had been dug in the side or the top of the roof. The Chief of Police of the City called for help; and not too long after that, in addition to some citizens, other law en-

forcement officers came, and they began a search of the woods, a wooded area, around the store that was broken into near Cave City. They appre—during their search, they found Moore, who had been seen running from the building or out of the hole, and a man named Hodges, the Appellant in this case, together—sitting together hiding under a log in the woods. And when the policeman hollered at them, they both got up and ran away together.

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And they were both indicted and tried, and Hodges was convicted; and the Court of Appeals reversed the Barren Circuit Court and threw it out saying that's not enough. Guilt by association is not sufficient to go to the jury.

The case of Walker versus the Commonwealth, 472 S. W. 2d starting at page 476, a 1971 case. The Court of Appeals reversed the McCracken Circuit Court and held that evidence that the defendant was found in the company of burglars or people who had perpetrated a burglary sometime after the commission of the offense, a few hours after the commission of the offense; and that a pistol taken in the burglary was found in the possession of one of the other burglars at that time, and that the defendant attempted to conceal his identity by presenting a false drivers license and later ran away and became a fugitive. All of these things combined were not enough, and they reversed the McCracken Circuit Court and threw their case out.

The next case for the Court's consideration is Collinsworth versus the Commonwealth, 476 S. W. 2d, page 201, 1972; and in that case, the Court of Appeals reversed the McGoffin Circuit Court and held that evidence was insufficient. This was an arson case where the evidence was that the defendant was seen going into the barn, staying in there a while, and coming out later; and then sometime after that, the barn was burnt up. And the Court of Ap-

peals held that while the evidence was sufficient to prove that the defendant had gone feloniously into

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the barn. They threw the case out on a charge of arson even though the barn starting burning not too long after he was seen leaving.

Next for the Court's consideration is the case of Thompson versus the Commonwealth, 479 S. W. 2d 583. In that case the Court of Appeals reversed the Jefferson Circuit Court and held where there was—where the defendant was linked to the crime by his—this was a murder case or a homicide case, Your honor—the defendant there was linked to the crime by being married to the victim, being the first one at her body, having removed the death weapon and having his fingerprints on the gun but not shown by a paraffin test that he fired it. That was insufficient evidence to take it to the jury.

These cases and a number of others with similar fact situations have been held by the Court of Appeals to be insufficient for the circuit courts to allow it to go to the jury. In this instance, in this case all we have is a proof—if you give the government its best inferences—is a proof that this defendant associated with—at one time or another associated with a defendant who has plead guilty, Byrns; and that he was in or around the community of Smiths Grove some half a mile away from the drugstore some hour or so after the burglary took place.

This, we submit, is not sufficient to take the case to the jury; and the Court should grant us our motion for a judgment of acquittal.

(Motion was denied by the Court, Vol. II, p. 210.)

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SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 74-1512

JOSEPH RAYMOND VITTITOW ..... PETITIONER

VS:

COMMONWEALTH OF KENTUCKY ..... RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT TO CERTIORARI

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STATEMENT OF THE QUESTIONS PRESENTED

I. WHETHER THE CIRCUMSTANTIAL EVIDENCE PRESENTED AT TRIAL BY THE PROSECUTION WAS SUFFICIENT TO SUPPORT PETITIONER'S CONVICTION OF GRAND LARCENY; AND, IS THERE A CONFLICT OF DECISIONS AMONG STATE AND FEDERAL JURISDICTIONS?

II. WHETHER THE SEARCH OF THE AUTOMOBILE DRIVEN BY THE PETITIONER PRESENTS A SUBSTANTIAL CONSTITUTIONAL QUESTION PERTAINING TO PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL?

III. WHETHER PETITIONER'S DUE PROCESS RIGHTS TO A FAIR TRIAL WERE VIOLATED BY THE ADMISSION INTO EVIDENCE OF PHOTOGRAPHS OF ONLY ONE SET OF BOOTPRINTS?

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 74-1512

JOSEPH RAYMOND VITTITOW ..... PETITIONER

VS:

COMMONWEALTH OF KENTUCKY ..... RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The Opinion Below from the Kentucky Court of Appeals is a Memorandum Opinion, not to be cited as authority, and is correctly set forth in the petitioner's Appendix at page 1A of his Petition for Writ of Certiorari.

JURISDICTION

Petitioner's application to invoke the jurisdiction of this Court should be denied because it fails to meet the jurisdictional requirements of Title 28 U.S.C. § 1257(3).

The petitioner urges this Court to grant his Petition

for Writ of Certiorari to consider three issues, each of which are alleged to involve substantial federal questions. But, no federal question was ever presented to the state courts until the petitioner filed a Supplemental Petition for Rehearing in the Kentucky Court of Appeals on January 16, 1975. However, by that point in time the Kentucky Court of Appeals had already affirmed the decision of the trial court on October 28, 1974. Subsequent to that affirmance, the petitioner filed a Petition for Rehearing before the Kentucky Court of Appeals on December 12, 1974. Shortly thereafter, petitioner retained new counsel and said counsel filed a Supplemental Petition for Rehearing urging *for the first time* alleged violations of federally constitutional rights. However, the Petition for Rehearing and Supplemental Petition for Rehearing were subsequently denied and the mandate was issued on February 21, 1975. There was no change in the original opinion of the Kentucky Court of Appeals affirming the petitioner's conviction.

As this Court is aware, when a federal question appears for the first time in a petition for rehearing filed with the highest state court, that question is deemed to have been properly raised only if the state court entertains the petition *and expressly rules upon and disposes of the federal question involved. Illinois Central Railway Co. v. Kentucky,* 218 U.S. 551 (1904). That rule, of course, is the same where the federal question is raised for the first time in a second petition for rehearing before the state court. *Bilby* v. *Stewart,* 246 U.S. 255, 257 (1917).

In the instant case the petitioner did not rely upon federal grounds in the state courts until he filed his Supplemental Petition for Rehearing in the Kentucky Court of Appeals. In any event, the opinion of the Kentucky Court of Appeals previously issued was not changed or effected in any manner whatsoever. In a case such as this where it is quite clear that the federal questions now urged were presented for the first time at so late a stage in the state proceedings and the state court did not expressly dispose of those questions, then this Honorable Court is obviously without jurisdiction to consider those matters on a petition tor writ of certiorari. *Illinois Central Railway Co. v. Kentucky,* supra.

Furthermore, the mere fact that petitioner cited United States Supreme Court cases to the state court is an insufficient predicate upon which to either raise a federal question or establish jurisdiction. After all, jurisdiction cannot be founded by surmise. *Lynch v. New York ex rel Pierson,* 293 U.S. 52 (1934). In raising a federal question, it is necessary that the question be presented in the state courts in such a manner that there is no doubt that reliance is upon federal rather than state rights. See *New York Central & Hudson River Railroad Co. v. New York,* 186 U.S. 269 (1901). This Court has stated that if it is uncertain whether a claim is grounded on some provision of the State Constitution or of the Federal Constitution, it will be assumed that reference is being made to the State rather than the Federal Constitution. See *New York ex rel Bryant v. Zimmerman,* 278 U.S. 63 (1928). Here, the opinion of the Court of Appeals of Kentucky contains no specific reference to either state or federal law. However, since that opinion was rendered

on the basis of a trial record and appellate briefs reflecting no federal grounds, it must be concluded that the opinion rests solely upon adequate state grounds. Therefore, this Court has no jurisdiction to review that opinion by way of certiorari. *Murdock v. Memphis,* 20 Wall 590 (1875). *Missouri Pacific Railroad Co. v. Hanna,* 266 U.S. 184 (1924).

Also, it is interesting to note that the petitioner does not specify what stage in the proceedings of the court of first instance and in the state appellate court at which, and the manner in which, the federal questions sought to be reviewed were raised. In the case at bar, the petitioner has failed to point out or make reference to the record below in order to establish where and the manner in which he presented the federal questions he now raises. Thus, even if the petitioner had raised the federal questions in the courts below, which he did not, his failure to comply with Rule 23 (1)(f) forecloses certiorari review by this Court now. After all,

> "The jurisdiction of this Court to reexamine the final judgment of the state court cannot arise from mere inference, but only from affirmance so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right." *Oxley Stave Co. v. Butler County,* 166 U.S. 648, 655 (1897).

In any event, the issues now presented by the petitioner, even if they had been properly raised in the court below, do not constitute substantial federal questions as would invest this Court with jurisdiction. This being

so, the petition should be dismissed. *Maryland and Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 390 U.S. 367 (1970).

For instance, petitioner's first contention is whether there was sufficient evidence to support the conviction. The Kentucky Court of Appeals, in their opinion affirming petitioner's conviction, stated ". . . that the evidence was sufficient to sustain the conviction, . . ." This is hardly a matter involving a substantial federal question. Even petitioner's allegation that the law is in conflict among jurisdictions in this area is totally unfounded. Similarly, the third contention fails to reflect a question of such substantial federal magnitude as to require review by certiorari. This issue centers around whether the petitioner was prejudiced by the admission of certain photographs and a key into evidence and testimony pertaining thereto. Again, no substantial federal question is presented thereby. Petitioner's second contention as to an alleged illegal search and seizure is likewise lacking of such substance as to necessitate review by certiorari.

Furthermore, this Court has consistently adhered to the self-imposed principle that it will not review a state court judgment based upon an adequate and independent nonfederal ground even if a federal question had been properly raised. *Berea College v. Kentucky*, 211 U.S. 45 (1908). Here, the opinion of the Kentucky Court of Appeals reflects the consideration of no federal issues. In fact, no federal issues arose for the trial court's consideration nor were any federal questions presented to

the Kentucky Court of Appeals prior to the rendition of that opinion. An examination of the opinion of the Kentucky Court of Appeals reflects that it was based solely upon state grounds and was not dependent on or touching upon a substantial federal question. Under these circumstances this Court has no jurisdiction to review the decision of the Kentucky Court of Appeals upon a petition for writ of certiorari since its power over state judgments is to correct them only to the extent that the state court incorrectly adjudged federal rights. *Herb v. Pitcairn,* 324 U.S. 117 (1945); *Dixon v. Duffy,* 342 U.S. 33 (1951); *Young v. Ragen,* 337 U.S. 235 (1949); *Madden v. Kentucky,* 309 U.S. 83 (1940); *Henry v. Mississippi,* 379 U.S. 443 (1965). Here, no federal questions are involved.

In fact, other than in a supplemental petition for rehearing filed in the Kentucky Court of Appeals, the record does not affirmatively indicate that the federal questions now raised were presented in any fashion to the state courts.[1] Moreover, a comparison of the federal questions now presented with the record indicates that those issues now raised would not have been necessary to the determination of the cause before the Kentucky Court of Appeals. Here, the decision of the Kentucky Court of Appeals was rendered without deciding, or without meaning to decide, the federal questions now presented to this court. *Southwestern Bell Telephone Co. v. State of Oklahoma,* 303 U.S. 206 (1938); *People of New York, ex rel Con-*

1/ The respondent, under separate cover, has lodged a certified copy of the state court record with the Clerk of the Supreme Court.

solidated Water Co. of Utica v. Maltbee, 303 U.S. 158 (1938).

Finally, certiorari jurisdiction is completely discretionary under Rule 19 and the respondent submits that the petition for writ of certiorari should be dismissed since the issues raised in the petition neither arise under such exceptional circumstances to require review of the decision of the Kentucky Court of Appeals nor present any federal questions, much less substantial federal questions, as would merit the discretionary exercise of this Court's review by certiorari. *Department of Mental Hygiene v. Kirchner,* 380 U.S. 194 (1965); *Cardinale v. Louisiana,* 394 U.S. 437 (1969).

SUMMARY

In summary, the respondent submits that the petitioner's application for writ of certiorari should be denied because it fails to meet the jurisdictional requirements of Title 28 U.S.C. § 1257(3). The purpose of review by writ of certiorari is not to give the defeated party another hearing, yet in the instant case the arguments set out in the petition are nothing more than a rehash of contentions previously presented relating to state law in the state trial and appellate courts. Only now those arguments are clothed in allegations of federal constitutional deprivations. As previously pointed out, these federal questions were raised too late to preserve those issues on certiorari review. Moreover, even if those issues had been properly preserved they do not constitute substantial federal questions as would require certiorari review. Nor has the peti-

tioner set out sufficient grounds in the petition as to justify the discretionary exercise of the jurisdiction of this Court under Rule 19.

The respondent will now endeavor to respond to each of the three contentions raised by the petitioner as though said contentions were properly before the Court, even though respondent maintains they are not.

STATUTORY PROVISIONS INVOLVED
KENTUCKY REVISED STATUTES 433.220

Any person guilty of larceny of money or other property of the value of one hundred dollars or more shall be confined in the penitentiary for not less than one nor more than five years. Any person who unlawfully takes, drives or operates a vehicle without the knowledge and consent of the owner shall be subject to the same punishment.

COUNTERSTATEMENT OF THE CASE

At approximately 1:30 a.m. on the morning of August 22, 1973, Mr. Carroll Bevarly, the owner of Smith's Grove Drugstore located on Main Street in Smith's Grove, Warren County, Kentucky, was awakened by the burglar alarm device located in his drugstore. (Transcript of Evidence, hereinafter TE, 75-77). Mr. Beverly's house is located four and one-half blocks from the drugstore and the latter building is equipped with a burglar device which sets off an alarm in Mr. Bevarly's home when activated. After awakening his wife, who proceeded to call the police, Bevarly immediately dressed, armed himself with a 12 gauge shotgun, and proceeded to his drugstore where

he saw three men on the roof of the building. (TE, 77-81, 96). However, it was so dark that he was unable to identify them other than as to their size.

Bevarly fired one warning shot whereupon the three men on the roof attempted an immediate descent to the ground. Two of the men jumped off the roof from the side of the building opposite from where Bevarly was standing and upon doing so they left bootprints at the spot where they hit the ground. (TE, 82-83). The third man, Eugene Byrns, had the misfortune of jumping off the roof and landing almost at the feet of Mr. Bevarly (Byrns left no bootprints because he was wearing several pairs of socks and no shoes). Although he attempted to flee, he ceased to do so upon threat of being shot by Mr. Bevarly. (TE, 84-86). Bevarly guarded Byrns with his shotgun until the subsequent arrival of the police 15 minutes later who placed Byrns under arrest.

Upon arrival at the scene of the crime by the police officers, Bevarly told them that there had been three men involved and two were still at large. (TE, 152). Several of the officers began searching the grounds and one, Police Chief Denham of Smith's Grove, got into his automobile and drove around the town looking for the two criminals. (TE, 131). As Chief Denham proceeded through the town he saw a car turn a corner and approach him (approximately two blocks away), suddenly switch off its lights, and pull into a driveway. (TE, 132). The occupant of the car got out and walked around to the rear of a nearby house. Chief Denham immediately drove up to the parked car and flashed a spotlight on the driver who was now standing in the back yard of this residence. Upon

request, the driver (the petitioner herein) approached the Chief's car and explained that he had stopped to get some water for his automobile which he claimed was overheated. However, the car, a Chevrolet Impala, did not appear overheated in that it was not steaming nor did a subsequent check of the radiator reveal a low water level. (TE, 133, 138, 161, 163). The petitioner stated that he had just gotten off I-65 and could not find an open service station. However, an all night service station, which is fully lit at all times, is located just off the I-65 exit near Smith's Grove. (TE, 171). Leaving the Chevrolet there, Chief Denham brought the petitioner back to the drugstore in his police car and turned him over to Deputy Sheriff Glenn Wood who was supervising the investigation of the crime.

From this investigation it appeared that entry into the drugstore had been accomplished by chopping a hole in the roof. (TE, 152-155). Also, a search of Byrns revealed that he had a huge quantity of narcotics in his possession which had been taken from the store. Deputy Sheriff Wood then asked the petitioner and Byrns if they knew one another but both denied ever having had the pleasure. However, Officer Wood compared the petitioner's boots to a set of prints found near where the burglars had landed after jumping off the roof. The prints matched the soles of the petitioner's boots and he was placed under arrest. Also, a key found in the possession of Byrns when he was searched was turned over to Chief Denham who was told to return to the Chevrolet Impala to see if it would fit in the ignition. Denham returned to the Chevrolet, opened the door, *reached in* and placed the key in the ignition and found that it did fit. As he was

testing the key, Chief Denham noticed two men's billfolds which were on the floor of the car and partially hidden under the front passenger seat. (TE, 133, 134). He took these billfolds back to Deputy Sheriff Wood. Wood inspected the billfolds and found that one belonged ot Byrns and the other to a person named James Stillwell. The petitioner was subsequently indicted and tried on charges of grand larceny and storehouse breaking.

The petitioner plead not guilty and did not testify in his own behalf at trial. On December 13, 1973, a jury in the Warren Circuit Court in Warren County, Kentucky, returned a verdict of guilty as to the grand larceny charge and fixed the petitioner's punishment at five years imprisonment. (Transcript of Record, hereinafter TR, 19). Judgment was entered pursuant to the jury's verdict on December 21, 1973, and was affirmed on appeal to the Kentucky Court of Appeals in a Memorandum Opinion rendered on October 25, 1974. (TR, 28). The petitioner now seeks review of the aforementioned Opinion by way of a petition for writ of certiorari to this Honorable Court.

ARGUMENT

I.

THE CIRCUMSTANTIAL EVIDENCE PRESENTED AT TRIAL BY THE PROSECUTION WAS MORE THAN SUFFICIENT TO SUPPORT THE PETITIONER'S CONVICTION OF GRAND LARCENY; THUS, NO SUBSTANTIAL CONSTITUTIONAL QUESTION IS PRESENTED NOR IS THERE A CONFLICT AMONG THE VARIOUS STATE AND FEDERAL JURISDICTIONS.

The petitioner was indicted for the offenses of storehouse breaking and grand larceny, as proscribed by KRS

433.190 and 433.220. (Transcript of Record, hereinafter TR, 2). Upon conviction on the grand larceny charge, the petitioner alleged on appeal to the Kentucky Court of Appeals that there was insufficient evidence to sustain such conviction for grand larceny. In rejecting this contention the Kentucky Court of Appeals indicated "that the evidence was sufficient to sustain the conviction." The petitioner now seeks review by certiorari and clothes this contention with the allegation that his right to due process of law has been violated. He also urges a conflict in the decisions among the various federal and state jurisdictions in regard to the issue now in question. The respondent disagrees.

KRS 433.220 reads as follows:

> *"Any person guilty of larceny of money or other property of the value of one hundred dollars or more shall be confined in the penitentiary for not less than one nor more than five years.* Any person who unlawfully takes, drives or operates a vehicle without the knowledge and consent of the owner shall be subject to the same punishment." (Emphasis ours).

Under Kentucky law, the elements of the aforementioned offense are as follows:

"1. Taking and carrying away

2. Money or other property of another

3. Of the value of $100 or more

4. With intent to steal it,

5. Venue." *Russell's Kentucky Practice,* Vol. 1, Part 3, Page 15.

As this Court is aware, the mere fact that the prosecution's evidence may be totally circumstantial is not relevant to a determination of whether that evidence is sufficient to support a guilty verdict. Circumstantial evidence which convinces a jury beyond any reasonable doubt is sufficient to sustain a conviction. *Holland v. United States,* 348 U.S. 121 (1954). Although the petitioner vigorously urges that the prosecution failed to prove all of the elements of the offense charged, oddly enough the petitioner fails to make specific mention of precisely what element or elements the prosecution failed to prove. Under Kenutcky law, in essence, the elements of larceny consist of a taking of and asportation of property of another by trespass with a felonious intent to permanently deprive the owner of his property. *Hunt* v. *Commonwealth,* Ky., 338 S.W.2d 912 (1960); *Wombles* v. *Commonwealth,* Ky., 317 S.W.2d 169 (1958).

Admittedly, the prosecuiton's case against the appellant was based solely upon circumstantial evidence since there were no eye witnesses as to the actual commission of the crime. However, the offense of grand larceny may be proved by circumstantial evidence. *Eversole* v. *Commonwealth,* Ky., 288 S.W.2d 58 (1956). In the instant case, the incriminating evidence presented by the prosecution established the petitioner's guilt beyond any reasonable doubt. For example, (1) it was established that Mr. Bevarly's drugstore had been broken into during the middle of the night; (2) that hundreds of dollars of merchandise, including watches and drugs, had been carried away (TE, 167-169); (3) Byrns had some of the stolen goods in his possession when he was apprehended; (4) that the petitioner was apprehended within one-half

mile of the scene of the crime; (5) the petitioner was observed pulling off the road, turning off his lights before his engine had stopped, got out of his car, walked to the rear of a residence allegedly looking for water for his overheated car although there was no evidence to indicate that the car was in fact overheated; (6) the petitioner (a stranger in town) had told the officers that he could not find an open service station at which to get water for his car although he would have had to have passed an all night service station which was open when he took the exit off I-65 — the direction from whence he said he had come; (7) when brought to the scene of the crime, he denied knowing Byrns although a key was found in Byrns' possession which also fit the ignition of the Chevrolet automobile which the appellant was driving that night (TE, 121-124); (8) moreover, two wallets were found in the Chevrolet automobile — one belonging to Byrns and the other to a man, James Stillwell; (9) two witnesses testified that they saw three men in the drugstore and thereafter on the roof attempting to flee and it appears that the petitioner, Byrns, and an unknown person were these three men; (10) two separate sets of bootprints were found at the spot where two men jumped from the roof of the drugstore and witnesses for the prosecution testified that one of those sets of prints was very similar to the prints of the boots worn by the petitioner (TE, 118, 161); (11) also, two identical books of matches were found, one in the possession of Byrns and the other in the possession of the petitioner at the time they were arrested.

In light of the foregoing, it is obvious that there was ample evidence to support the jury's belief beyond any

reasonable doubt as to the guilt of the appellant. *Hollowell* v. *Commonwealth*, Ky., 492 S.W.2d 884 (1973). Thus, the conviction shoud be upheld. *Shelton v. Commonwealth*, Ky., 484 S.W.2d 95 (1972); *Faughn* v. *Commonwealth*, Ky., 453 S.W.2d 743 (1970); *Winn* v. *Commonwealth*, Ky., 303 S.W.2d 275 (1957).

Finally, the petitioner asserts that there is a conflict of decisions in regard to the issue at bar and, for this reason too, urges that certiorari review should be granted. However, for the reasons previously set out in the Jurisdictional Statement and in this argument, the respondent submits that the petitioner has failed to demonstrate the existence of any real conflict of decisions in state and/or federal courts pertaining to the issue now presented. An examination of this contention clearly indicates that there exists no such conflict nor does it reveal any alleged violation of the constitutionally protected right to due process of law — an allegation raised too late to be a basis for certiorari review. The petition should be denied.

II.

THE SEARCH OF THE AUTOMOBILE DRIVEN BY THE PETITIONER DOES NOT PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION PERTAINING TO HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL.

The petitioner maintains that the police made an illegal search of the automobile which he had been driving on the night of his arrest. He further alleged that the admission into evidence of two wallets found in the automo-

bile over his motion to suppress, violated his constitutional right to a fair trial. Respondent disagrees.

As previously set out in the Jurisdictional Statement, the constitutional issue now presented was not properly raised in the state courts and thus review by certiorari is unwarranted here. In any event, the precise question presented under the facts of the case at bar is neither novel, unsettled, or reflective of a conflict of decisions between jurisdictions, nor does the law in this matter require a change in the law or warrant further consideration. Moreover, the petitioner has failed to establish in what manner the decision by the Kentucky Court of Appeals is at variance with any prior decision of this Court, nor has he established that this state court has ruled upon a substantial federal question not heretofore decided by this Honorable Court. Under these circumstances certiorari jurisdiction simply does not exist.

The Kentucky Court of Appeals indicated that "the search was valid." (Petitioner's Appendix 1A). Respondent would point out that there is no indication whatsoever that the court based its opinion on federal law in regard to the search and seizure. This issue could have been resolved under state law since the Fourth Amendment of the United States Constitution and Section Ten of the Constitution of Kentucky are of similar import. Furthermore, the concept of due process of law, vouchsafed to all citizens under the Fourteenth Amendment of the United States Constitution is similarly vouchsafed to the citizens of Kentucky by the Bill of Rights of the Constitution of Kentucky, Section Fourteen. See *O'Brien* v. *O'Brien*, 294 Ky. 793, 172 S.W.2d 595, 609 (1943).

Mere recitation of United States Supreme Court authority in petitioner's state court briefs is insufficient, per se, to raise a federal question or establish certiorari jurisdiction since such jurisdiction cannot be founded by surmise. *Lynch* v. *New York ex rel Pierson*, 293 U.S. 52 (1934). Therefore, the respondent submits that the Kentucky Court of Appeals opinion in regard to the allegedly illegal search and seizure was, in essence, a state decision and not based upon federal law. Simply stated, petitioner has failed to establish, or preserve for review any issue pertaining to alleged violations of federal constitutional rights.

Secondly, the facts in the instant case indicate that the automobile in question was registered in the name of a Mr. Walton from Jefferson County, Kentucky. (Transcript of Evidence, 176). In fact, nowhere in the record does there appear an affirmative allegation on the part of the petitioner that he had any possessory or proprietary rights or any other indicia of ownership in the automobile which was the subject of the search and the source of the seized evidence. Petitioner does not maintain that he owned the automobile, leased it, or borrowed it. Under these circumstances, the respondent maintains that the petitioner does not have standing to raise the issue of an alleged illegal search and seizure of that automobile. *Iles v. Commonwealth*, Ky., 476 S.W.2d 170 (1972); also see *United States v. Brown*, 452 F. 2d 868 (6th Cir. 1971).

Thirdly, this Court has made a very definite distinction in the law of search and seizure between house, office, and storehouse on one hand and motor vehicles on the

other. *Carroll* v. *United States,* 267 U.S. 132 (1925). If exigent circumstances exist in the reasonable judgment of the police officer as to probable cause, a predicate sufficient to authorize a search comes into existence. *Chambers* v. *Maroney,* 399 U.S. 42 (1970). The facts in the case at bar as reflected in the Counterstatement of the Case, were sufficient to permit a search of the automobile by Chief Denham. For instance, the police had been advised that three men had participated in the breakin which had occurred only minutes earlier. By the time Denham returned to the automobile two men were under arrest for the robbery, Byrns and the petitioner, and *one was still at large.* When Denham opened the car door, reached in, and placed the key found on Byrns in the ignition, and started the automobile, there was even more justification to search the automobile immediately because this fact, along with several others, was more than sufficient to implicate the petitioner in the offense which had previously been perpetrated Moreover, it is most certainly conceivable that the third man who was still at large, or some passerby, could have whisked the automobile away in the dead of night or taken or destroyed the contraband or whatever incriminatory evidence the car may have contained. Also, at the time Denham returned to the automobile it was not known by the police whether all the items stolen from the drugstore had been recovered. It was possible that contraband could have been hidden in the automobile. This fact, in and of itself, would have justified an immediate search of the vehicle. *United States v. Gargotto,* 476 F. 2d 1009 (6th Cir. 1973); *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971); *Chambers* v. *Maroney,* supra. Lastly, it should be kept in mind that the wallets were seized not

as a consequence of a "search" in the common sense, but because Denham, upon reaching into the car to place the key in the ignition observed the two wallets protruding from under the front seat. The law of search and seizure is based upon "reasonableness." And, under the facts of this case, the petitioner has failed to establish that his federal constitutional rights were violated by the actions of the police on the night he was arrested.

III.

PETITIONER'S DUE PROCESS RIGHTS TO A FAIR TRIAL WERE NOT VIOLATED BY THE ADMISSION INTO EVIDENCE OF PHOTOGRAPHS OF ONLY ONE SET OF BOOTPRINTS.

The Kentucky Court of Appeals also rejected the petitioner's contention that he was denied a fair trial due to an alleged failure of the Commonwealth to allow discovery of crucial evidence. This contention was predicted upon photographs which did not turn out of two pair of bootprints left at the scene of the crime and which were not introduced into evidence at the trial. Petitioner presents this same issue to this Honorable Court with the additional allegation of a violation of federal constitutional rights. However, perusal of petitioner's argument establishes no violation of federal rights was ever timely raised in the state courts. More significantly the contention presented for consideration is not one which would merit certiorari review in any event.

The petitioner's due process rights to a fair trial were not violated by the admission into evidence of photographs of only one set of bootprints.

Petitioner's allegation that he was denied access to certain unclear photographs of unclear bootprints is inconsequential. Perusal of the prosecution's evidence indicates that *two sets* of bootprints were found at the spot where two men landed after jumping off the roof of the drugstore. One set of prints was well set into the ground, clearly distinguishable, and easily photographed. Two photographs of this particular set of bootprints were made by the mobile crime lab and subsequently introduced into evidence at trial along with numerous other photographs of the drugstore, the hole torn in the roof of the building, and other companion photographs dealing with the crime.

No photographs were introduced as evidence of the *second set of bootprints* because they were not well set in the ground, not clearly distinguishable and the photographs of those prints did not turn out. Therefore, these photographs were not kept nor were they used as evidence at trial, and obviously not presented for inspection to the defense nor for that matter the jury. *However, it was this set of prints that was similar to the soles of the petitioner's boots.* (TE, 118, 161). This was established not by the photographs, but by eyewitness testimony.

This situation is somewhat analogous to dusting for fingerprints, which did occur in this case. For instance, when such dusting reveals prints of the accused these are documented, samples are taken as exhibits, and may become subject to procedural discovery pursuant to Kentucky Criminal Rules and thereafter they may be presented as evidence at trial to the jury and court. However, where dusting for fingerprints reveals only smudges or undefined prints (as happened in this case), these samples are not

kept since they are of no value and will not be used at trial, and of course are not subject to procedural discovery.

At the trial no prosecution witnesses testified that the *photographs* introduced into evidence of a set of bootprints were those belonging to the petitioner. In fact, the contrary is true. Thus if there is any issue at all as to the probity of the prosecution's witnesses concerning their personal identification and comparison of the petitioner's boots to one of the two sets of bootprints found at the scene of the crime, it was a matter for the jury to determine. Moreover, no proper objection was made by the petitioner insofar as these "unclear photographs of unclear boot prints." Even if such an objection had been made the respondent submits that it would have been improper since these photographs were in fact unclear, revealed nothing, were not used or introduced at the trial and were of no consequence. Again, the testimony of witnesses at the scene who identified and matched the petitioner's boots to those bootprints which were found was proper and its relevancy, weight and credibility were matters for the jury. *Webb Transfer Lines, Inc.* v. *Taylor,* Ky., 439 S.W. 2d 88 (1969); *Hayes* v. *Hayes,* Ky., 357 S.W.2d 863 (1962). Therefore, the respondent submits that this contention, obviously not a basis for reversal of the petitioner's conviction under state law, is equally without merit as a basis for review by certiorari since it presents no federal constitutional questions at all.

CONCLUSION

The issues presented by the petitioner alleging a denial of federally protected constitutional rights have not been raised in the state courts below and thus are not a basis for the granting of certiorari review. Moreover, these same issues do not constitute or raise a substantial federal question. Nor do any of those issues involve any real conflict of decisions between or among other state or federal courts. For the foregoing reasons, the respondent respectfully submits that the petitioner has failed to meet the jurisdictional requirements of 28 U.S.C. § 1257(3) and requests that the petition for writ of certiorari be dismissed.

Respectfully submitted,

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PROOF OF SERVICE

I, Patrick B. Kimberlin, III, one of counsel for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of June, 1975, I served the petitioner with Brief for Respondent in Opposition to Petition for Writ of Certiorari, by placing 3 copies of the same in the United States mail, first class postage prepaid, and addressed to Hon. J. Marshall Hughes, WHITE & HUGHES, 439 Park Row, Executive Building, Bowling Green, Kentucky 42101, Counsel for Petitioner.

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